PIRAYOU
LAW OFFICES

March 10, 2006

**VIA FACSIMILE: 916-327-2026**

The Fair Political Practices Commission
Attention: Commission Chair Liane M. Randolph
428 J Street, Suite 620
Sacramento, CA 95814

***RE: IN RE PIRAYOU OPINION REQUEST O-06-016 - AGENDA 3/14 ITEM 10***

Dear Chairperson Randolph and the Honorable Members of the Commission:

I serve as Legal Counsel to former California Assemblymember Ellen Corbett (Ms. Corbett).

This letter is in response to the Fair Political Practices Commission's (Commission) Legal Division Memorandum (Memorandum), issued on February 27, 2006, in the above-referenced matter.

Respectfully, Ms. Corbett disagrees with the Memorandum's analysis and conclusion, recommending the Commission deny Ms. Corbett's request to transfer the funds remaining in her Assembly Committee to her Senate Committee with attribution.

The Memorandum presents the proverbial "Pandora's box" as the main argument against granting Ms. Corbett the requested relief:

> If the Commission were to construe principles of detrimental reliance and fundamental fairness in such a way that it felt it should grant the requested relief, a 'parade of horribles' ***might*** ensue. It is ***not unlikely*** that the Commission would soon be inundated by requests from elected officials to be excused from complying with a variety of mandates set out in the language of the Act, based upon the negligence of treasurers willing to fall on their swords. Memorandum at Page 10. (Emphasis added).
>
> [i]f the requested relief were granted, the Commission ***might*** invite a long line of elected officials seeking similar relief, from all types of mandates in the Act, based upon the purported negligence of their treasurers. Memorandum at Page 14. (Emphasis added).

First, the "parade of horribles" is greatly exaggerated. Since its creation in 1974, the Commission has, in the nearly three decades of existence, addressed the issue of whether a candidate can obtain relief from an "error of law" in interpreting the Political Reform Act (Act)

only ***five*** times, even in the context of thousands and thousands of candidates seeking elective office over the past 30 years in the State of California.[1] In other words, granting Ms. Corbett's requested relief would not create so many exceptions to the rule as to evaporate the rule, as demonstrated by previous historical precedent. Importantly, the Memorandum does not:

Provide additional references to any other situations wherein the Commission has faced issues dealing with an "error of law" in interpreting the Act based upon "the negligence of treasurers willing to fall on their swords";

2. Provide any statistics to support the Memorandum's claims that an unprecedented number of officials might seek relief from the Commission; or

3 Provide any rebuttal to the declaration of Ms. Corbett's treasurer that Ms. Corbett's situation is likely the ***only situation*** in the State of California dealing with section 85306 and regulation 18536, such that no other elected official would request similar relief from the Commission based upon its Opinion in this extraordinary case. *See* Exhibit B of the Memorandum, Declaration of Rita Copeland, Line 19.

Thus viewed, based upon the historical record, Ms. Corbett submits that the Commission's acceptance of her position – to provide her relief from the ***admitted*** (not "purported") error of her campaign treasurer – will ***not*** create an avalanche of requests from elected officials to be excused from the Act's requirements.

Simply put, Ms. Corbett "predict[s] that the dreaded, and overused, Pandora's box would prove to be comparatively empty."[2]

Second, it is important to carefully consider the facts and conclusion of the seminal Commission case dealing with "errors of law" and resulting hardships to candidates: Miller Advice Letter, No. A-03-017, 2003 Cal. Fair-Pract. LEXIS 45. (See Attached Copy).

The specific facts of Miller were as follows:

Ms. Miller was a defeated candidate for State Assembly in the process of closing out her November 2002 Assembly campaign account.

[1] As part of the research in submitting the Request for Formal Opinion, Ms. Corbett's legal counsel conducted an extensive search of all the Commission's advice letters and California law addressing the issue of an "error" being corrected by the Commission in furtherance of the Act's purpose. The only Advice Letters discovered by Ms. Corbett's legal counsel were those cited in the Request for Opinion letter, dated, January 27, 2006, including the following: Miller Advice Letter, No. A-03-017, 2003 Cal. Fair-Pract. LEXIS 45, page 5-6, citing Tomberlin Advice Letter, No. A-97-505, 1997 Cal. Fair-Pract. LEXIS 37; Johannessen Advice Letter, No. A-96-281, 1996 Cal. Fair-Pract. LEXIS 210; and Roney Advice Letter, No. A-92-420, 1992 Cal. Fair-Pract. LEXIS 228. *See also*, Campbell Advice Letter, No. A-04-153, 2004 Cal. Fair-Pract. LEXIS 152. The Memorandum does not cite any additional letters involving "errors of law" interpreting the Political Reform Act.

[2] *See* Dissent of J. Richardson. Carsten v. Psychology Examining Committee of the Board of Medical Quality Assurance, (1980) 27 Cal. 3d 793, 805.

2. At the end of December 2002, the candidate received a letter from the County of Los Angeles stating that, because they had charged her too much for the candidate filing fee, she would receive a refund check.
3. The candidate then received a refund check in the amount of $1,158.24 payable to her and not her campaign committee.
4. The initial payment of the candidate filing fee was made using $900 from the candidate's personal funds.
5. The candidate had deposited the $900 into her committee account and had written a committee check to the Secretary of State for $2,000, the total amount of the filing fee.
6. The candidate was unaware of the exception in the definition of contribution for the payment of the filing fee and thus characterized the $900 payment as a "contribution" on the Campaign Disclosure Form 460.
7. The candidate wished to cash the refund check and reimburse the $900 in personal funds she had deposited in her committee account.
8. The candidate also stated she would place the balance back into her campaign account and planned to close the account by donating the remaining funds to a charity.

The Commission was asked whether the defeated candidate could use the refunded funds to repay $900 she had paid from personal funds for the filing fee and the Commission concluded that the defeated candidate "may repay yourself the $ 900 paid from your personal funds."

Importantly, in Miller, the Commission squarely addressed section 89519, at issue in Ms. Corbett's case, pointing out in the Miller analysis that section 89519:

> provides that 'upon leaving any elected office, or at the end of the postelection reporting period following the defeat of a candidate for elective office, whichever occurs last,' funds held by a defeated candidate are considered 'surplus' campaign funds and may only be used for certain restricted purposes.

Importantly, the Commission went on to conclude that:

> A filing fee refund received after December 31, 2002, and deposited into your committee account ***is considered surplus funds***. [Citations omitted]. (Emphasis added).

After setting forth the expenses that a candidate may pay under section 89519, which clearly allowed Ms. Miller to use surplus funds to make a charitable donations from the refund proceeds and the repayment of contributions to donors (but not a candidate), the Commission went on to state:

> [h]owever, although a charitable donation is a permitted use of surplus funds, whether you may receive back the funds you deposited into your campaign to pay the filing fee is ***problematic***. Because you were unaware of the exception in the definition of contribution for the payment of the filing fee, you had characterized your $900 payment as a contribution on the Campaign Disclosure Form 460. As stated previously, under section 82015(c), the term 'contribution' does ***not*** include

> the candidate's money used to pay either a filing fee for a declaration of candidacy or a candidate statement prepared pursuant to section 13307 of the Elections Code. If this was not a contribution to your campaign, then section 89519(b)(2) permitting the repayment of contributions may not be invoked to allow you to receive back the funds. ***However, under the unique facts of this situation***, your description of the payment to the campaign committee was due to ***an error of law***. ***The Commission, in extraordinary circumstances where hardship would otherwise result and the purposes of the Act would not be furthered by a strict application of the law, has allowed committees to remedy an error that was made due to a good faith misreading of the law***. (Tomberlin Advice Letter, No. A-97-505; Johannessen Advice Letter, No. A-96-281; Roney Advice Letter, No. A-92-420.) Therefore, you may amend your previously filed campaign statements . . . and [t]he payment of $ 900 back to you should be reported as an expenditure on Schedule E. (Emphasis added).

In short, the Commission, in the face of the ***exact same statute*** – section 89519 – and its ***express terms***, allowed a losing candidate to use what were clearly "surplus funds" under the Act for a purpose ***explicitly prohibited*** by the Act's specific language – reimbursing of a candidate fee.

Contrary to the Memorandum's suggestions, the issue before the Commission is not whether the Commission "finds that the plain meaning of the language in section 89519" to be "clear" or "not clear." Memorandum at Page 6. Rather, the issue before the Commission is, given the undisputed and unique facts and previous Commission advice letters, should the Commission grant Ms. Corbett's request in order to avoid the significant hardship to Ms. Corbett resulting from a strict interpretation of section 89519 in light of the Act's purpose.

Ms. Corbett strongly believes the Commission should grant the request for relief in furtherance of the Act's purpose and requests that she not be treated any differently than previous candidates seeking relief from the Commission from a strict application of the Act's requirements in very limited situations in furtherance of the Act's purpose.

While the facts might be slightly different in Miller than in Ms. Corbett's case, it is fundamentally unfair and nonsensical to have different legal standards being applied to different candidates in the face of the ***exact same*** provision of the Act – section 89519.

The factual differences between Miller and Corbett can be segregated into four distinct differences:

1. the ***amount*** considered "surplus" ($900 versus $81,617);
2. the ***intended uses*** of the clearly "surplus" funds -- repayment of a personal funds versus voter outreach efforts as part of a subsequent campaign;
3 the ***cause*** of the error -- the candidate's error in characterizing a transaction versus the good faith error of the committee's treasurer in misreading of the law (believing additional time was allowed to transfer funds from one campaign committee to the other); and

4. the ***type of resulting hardship*** in denying relief requested -- loss of $900 in personal funds versus the loss of the ability to use the funds for purposes of voter outreach.

The previous Commission decisions on issues of "error of law" are very clear: In extraordinary circumstances where hardship would otherwise result ***and*** the purposes of the Act would not be furthered by a strict application of the law, the Commission has allowed committees to remedy an error that was made due to a good faith misreading of the law.

Ms. Corbett, as set forth in her brief to the Commission, has met both of these thresholds (hardship and furtherance of the Act's purpose) and is, therefore, per the Commission's previous precedents, entitled to the Commission's consideration in receiving the requested relief she seeks from the Commission. Thus viewed, contrary to the Memorandum, it is not Ms. Corbett's request that the "Commission can and should ignore the language of section 89519" and allow Ms. Corbett to "use surplus funds in a way that contravenes the explicit language of section 89519, so long as, pursuant to section 81002(a), the voters are fully informed." Memorandum at Page 7.

In fact, it is clear that the equities would be in favor of Ms. Corbett versus Ms. Miller in a side-by-side comparison of their cases, because, unlike Ms. Miller, Ms. Corbett repeatedly attempted to avert any issues by requesting that her treasurer transfer the funds from her Assembly committee to her Senate committee. Whereas Ms. Miller, from the facts set forth in the Commission's advice letter, did not make any effort to understand how her personal funds should be characterized as part of her Campaign Disclosure Form 460 filing.

The Memorandum's recommendations and conclusions, in effect, create modifications of the Commission's previous precedents by adding additional criterion – the amount of error, the intended uses of funds, the cause of the error, and the type of resulting hardship – previously not required by the Commission.

Finally, the Memorandum suggests an alternative for the Commission's consideration:

> [t]he applicable remedy here may be for the Commission as a quasi-legislative body to re-examine the statute and its regulations, and to alter the regulations, if feasible and appropriate, but not to provide the specific relief from the consequences of a candidate's inaction, a relief that may be more appropriate for the courts ***or for the Commission in a quasi-judicial role***. [Citing, Code of Civil Procedure section 473(b) . . . .; also see Reg. 18361.59d) [authorizing the Commission to consider aggravating and mitigation factors, but only for purposes of fashioning an appropriate penalty in the enforcement context – i.e., after a violation of the Act has occurred]]. (Emphasis added). (Memorandum at Page 12).[3]

[3] The Memorandum's suggestion that Ms. Corbett may obtain relief, per Code of Civil Procedure section 4739(b), by seeking relief from the California courts, ignores the financial reality that any such action by Ms. Corbett would create significant legal expenses that would completely exhaust the balance remaining in her Assembly accounts. Therefore, Ms. Corbett believes that such alternative options are not feasible in this situation.

Following this analysis, which suggests that the Commission's quasi-judicial role is applicable only to enforcement matters under Regulation 18361.5(d), the Commission would not have had the authority to issue the Miller advice letter (or any other cases dealing with an "error of law") and to provide specific relief in extraordinary circumstances to remedy a hardship in furtherance of the Act.

Respectfully, Ms. Corbett asks the Commission to grant the relief requested under these extraordinary circumstances caused by the Treasurer's good faith misreading of the law and allow the transfer of funds remaining in her Assembly Committee to her Senate Committee.

Very truly yours,

PIRAYOU LAW OFFICES

By: _____
ASH PIRAYOU
ATTORNEY AT LAW

*2003 Cal. Fair-Pract. LEXIS 45, **

CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
ADVICE LETTERS

Our File No. **A-03-017**

2003 Cal. Fair-Pract. LEXIS 45

March 26, 2003

**[*1]** Gladys O. Miller, Post Office Box 2061, South Gate, CA 90280

Re: Your Request for Advice

Dear Ms. Miller:

This letter is in response to your request for advice regarding the campaign provisions of the Political Reform Act (the "Act"). n1

QUESTIONS

1. How may you negotiate a check made out in your name and not to your committee, when the check is a refund paid to you by the County of Los Angeles for an overpayment of your candidate's filing fee?

2. May you use the funds to repay $ 900 you paid from personal funds for the filing fee?

CONCLUSIONS

1. Because you paid the filing fee from your campaign bank account, which is still open, you must deposit the refund check in your campaign bank account.

2. Yes, you may repay yourself the $ 900 paid from your personal funds.

FACTS

You are a defeated candidate for State Assembly in the process of closing out your 2002 Assembly campaign account. At the end of December 2002, you received a letter from the County of Los Angeles stating that, because they had charged you too much for the candidate filing fee, you would receive a refund check. You have since received the check in the **[*2]** amount of $ 1,158.24 payable to you and not your campaign committee. The initial payment of the candidate filing fee was made using $ 900 from your personal funds. You had deposited the $ 900 into your committee account and had written a check to the Secretary of State for $ 2,000, the total amount of the filing fee. You would like to cash the refund check, reimburse the $ 900 in personal funds you deposited in your committee account, and place the balance back into your campaign account. You then plan to close the account and donate remaining funds to charity.

ANALYSIS

The Act requires candidates and officeholders to establish a campaign bank account into which all campaign contributions must be deposited and from which all campaign expenditures must be made. n2 (Section

85201.) A partially refunded candidate filing fee, however, refunded by a governmental agency would not be considered a contribution n3 because the governmental agency would have had no political purpose in making the refund. (Steadman Advice Letter, No. I-93-252.) Although the refund payment is not a contribution **[*3]** to your committee, the Act's prohibition on the personal use of campaign funds would not permit you to retain for personal purposes funds received from a governmental entity as reimbursement for expenses originally paid out of your campaign account. (See sections 89510 - 89522; Burton Advice Letter, No. A-93-162.) Therefore, you must reimburse your committee for the expenses by either depositing the check directly into your committee account or endorsing it to your committee account.

Section 89519 provides that "upon leaving any elected office, or at the end of the postelection reporting period following the defeat of a candidate for elective office, whichever occurs last," funds held by a defeated candidate are considered "surplus" campaign funds and may only be used for certain restricted purposes. A filing fee refund received after December 31, 2002, and deposited into your committee account is considered surplus funds. (Tabachnik Advice Letter, No. I-97-410; Ranish Advice Letter, No. A-94-080; Steadman, supra.) Under section 89519, a candidate may only spend surplus funds on the following expenses:

* Payment of outstanding campaign debts or officeholder expenses.

* Repayment **[*4]** of contributions.

* Donations to any bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organization, if no substantial part of the proceeds will have a material financial effect on the candidate, any member of his or her immediate family, or the campaign treasurer.

* Contributions to a political party or committee, so long as the funds are not used to make contributions in support of or in opposition to a candidate for elective office. Contributions to support or oppose any candidate for federal office, any candidate in another state, or any ballot measure.

* Professional services, such as legal or accounting services reasonably required by the committee to assist in its administrative functions.

* A home or office security system, if the candidate has received threats to his or her physical safety and other conditions are met.

You wish to use the surplus funds left in your account to reimburse yourself the amount you paid from personal funds for the filing fee and then give the remainder to a charity. Section 89519(b)(3) permits you to make a charitable donation of the remaining funds if no substantial part of the proceeds will have a **[*5]** material financial effect on you, any member of your immediate family, or on the campaign treasurer. However, although a charitable donation is a permitted use of surplus funds, whether you may receive back the funds you deposited into your campaign to pay the filing fee is problematic. Because you were unaware of the exception in the definition of contribution for the payment of the filing fee, you had characterized your $ 900 payment as a contribution on the Campaign Disclosure Form 460. As stated previously, under section 82015(c), the term "contribution" does not include the candidate's money used to pay either a filing fee for a declaration of candidacy or a candidate statement prepared pursuant to section 13307 of the Elections Code. If this was not a contribution to your campaign, then section 89519(b)(2) permitting the repayment of contributions may not be invoked to allow you to receive back the funds. However, under the unique facts of this situation, your description of the payment to the campaign committee was due to an error of law. The Commission, in extraordinary circumstances where hardship would otherwise result and the purposes of the Act would not be furthered by **[*6]** a strict application of the law, has allowed committees to remedy an error that was made due to a good faith misreading of the law. (Tomberlin Advice Letter, No. A-97-505; Johannessen Advice Letter, No. A-96-281; Roney Advice Letter, No. A-92-420.) Therefore, you may amend your previously filed campaign statements to reflect your payment to your committee as a "Miscellaneous Increase to Cash" (Schedule I, Form 460). The payment of $ 900 back to you should be reported as an expenditure on Schedule E.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca

General Counsel

By: Adrianne Korchmaros
Political Reform Consultant

**FOOTNOTES:**
n1 Government Code sections 81000 - 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

n2 There is an exception to this rule for the use of a candidate's personal funds for a candidate's filing fee or a statement of qualifications fee. (Sections 82015(c) and 85201(f).)

n3 The definition of what is a "contribution" is found in section 82015 and regulation 18215